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No. .....

In the

Supreme Court of the United States

HOLMES MARCY DAVENPORT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Supreme Court of the United States:

Now comes Holmes Marcy Davenport, hereinafter called petitioner and applies for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, to review a judgment entered in said cause on June 12, 1952, affirming a judgment against petitioner entered in the United States District Court for the Northern District of Texas, Dallas Division, on No-

vember 27, 1951, and in support thereof, respectfully represents:

STATEMENT OF THE CASE

Petitioner was charged by indictment in four counts and was convicted on count No. 1 after counts 2, 3 and 4 had been dismissed on Motion of the United States Attorney. (Tr. 7.) Count No. 1 charged petitioner with unlawful purchase of 17 grains of pantopen, a narcotic drug, not in or from the original stamped package. (Tr. 1-2.)

The case was tried to a jury on his plea of not guilty, petitioner was found guilty and sentenced to imprisonment for a period of two years. (Tr. 6.)

The record of the testimony is voluminous, and a full statement thereof would unduly enlarge this Petition. The necessary and pertinent facts germane to the considerations presented herein are hereafter stated in connection with the discussion of the reasons relied upon for allowance of the Writ.

QUESTIONS PRESENTED

The opinion of the Court of Appeals rendered June 12, 1952, overruling the petitioner on four grounds of error presented to that Court. They are:

1. Abuse of discretion on the part of the court in denying Motion for Continuance.
2. Errors of the Court in admitting illegal, prejudicial and hearsay evidence over the timely objection of appellant.

3. Insufficiency of the evidence.

4. Inadequacy of the Court's charge.

The petitioner considered the errors raised in the Court of Appeals fundamental to a fair and impartial trial, and they are presented here with the earnest insistence that the Court of Appeals erred in affirming the judgment of the trial court because of:

1. Failure of the Court to properly instruct the jury on the laws of the case.

2. Insufficiency of the evidence as to the proof of venue. (Point No. 3 in Brief in Court of Appeals.)

3. The Court committed reversible error in admitting in evidence hearsay testimony, which was highly prejudicial to the rights of the appellant. (Point No. 2 in Brief in Court of Appeals.)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The Court of Appeals, 5th Circuit, in the instant case, erred in refusing to reverse the case because of the trial court's failure to instruct the jury on the law of the case. This is in direct conflict with the decision in *Morris v. United States, 156 Fed. 2d 525*, by the 9th Circuit, and in direct conflict with the opinion of this Court in *Screws v. United States, 325 U. S. 91.*

2. The Court of Appeals, 5th Circuit, committed error in its opinion, in the instant case, in failing to hold that proof of possession is not proof of venue where the offense charged is the purchase of narcotics, and such holding

is in direct conflict with the decision in *Donaldson v. United States*, by the 8th Circuit, *23 Fed. 2d 178.*

3. The Court of Appeals, 5th Circuit, in its opinion in the instant case, in affirming the judgment of the lower court has so far departed from the accepted and established standards for judicial proceedings, and has sanctioned such departure by the lower court as if to require and call forth this Court's power of supervision and revision to the end that uniformity of decision be obtained, and that the settled principles of judicial procedure, and safeguards long established as essential to a fair trial, be not broken down.

4. The Court of Appeals in its opinion, in the instant case, departed from the accepted and established standard for judicial proceedings, in not reversing the judgment of the trial court because of the admission of prejudicial evidence which was violative of the hearsay rule. (Point No. 4 in Petitioner's Brief in Court of Appeals.)

CONCLUSION

The opinion of the Court of Appeals, 5th Circuit, committed reversible error in its failure, as a reviewing Court, to notice the errors pointed out in Petitioner's Brief in order to determine whether the petitioner had been granted a fair and impartial trial in the District Court. The effect of such opinion of the Court of Appeals is to sanction the rulings and actions of the trial court in

(a) Holding that proof of possession was proof of venue.

(b) Failing to instruct the jury on the law of the case.

(c) In admitting hearsay testimony which was highly prejudicial, which action of the trial court, as hereinabove asserted, is contrary to the principles of law established judicial proceedings applicable to a case where liberty is involved, as petitioner verily believes. On these grounds it is respectfully submitted that this petition for Writ of Certiorari should be granted.

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No. .....

In the

Supreme Court of the United States

HOLMES MARCY DAVENPORT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPORTING BRIEF

To the Honorable, the Supreme Court of the United States:

REFERENCE TO THE OPINION OF THE CIRCUIT COURT OF APPEALS

The opinion of the Court of Appeals, 5th Circuit, in the appeal of Holmes Marcy Davenport, Appellant v. United States of America, Appellee, was rendered on June 12, 1952, before Hutcheson, Russell and Strum, Circuit Judges, and reads as follows:

> "Of the first, the denial of the motion for continuance, it is sufficient to say: that the granting or refusal of a continuance is within the sound discretion of the court and not subject to review in the absence

of a clear showing of abuse. U. S. v. Glasser, 116 F. 2d 690; J. E. Hanger v. U. S., 160 F. 2d 8; and that no prejudice to appellant from the refusal is shown.

"The second, while quite general in its statement, is in the brief confirmed to two matters. One of these having to do with permitting the arresting officer, over the objection that it was immaterial and a conclusion, to testify as to the common use in connection with narcotics of a 'finger stall' found in the bottle which contained the narcotics, is, we think, wholly wanting in merit. The testimony was neither immaterial nor a conclusion. The witness was not asked to give his opinion as to the use made or intended to be made of the particular finger stall found. In connection with his testimony as to finding it, he was asked, and testified, as to the nature and uses of finger stalls as he had observed them in his work as a narcotic officer. The answers made were relevant and factual, and it was not error to admit them in evidence.

"The second of the Testimonial errors claimed in the brief, that the search of the premises was illegal, and the evidence obtained thereby inadmissible, finds no support in the record.

In the first place, the search was by state officers and while it was contended that they were acting in concert with federal officers, there was no proof that they were. In the second place, they had a search warrant. It is true that in his brief, appellant seeks to make the federal rule, that a search warrant, unless so providing on its face, may not be executed at night and that this search warrant, though not authorizing it, was served at night. He did not, however, make this objection below, for the reason, no doubt, that this was not a federal but a state search, and the federal rule excluding evidence so obtained was not applicable.

"On his second and third grounds of error, appellant stands no better. Not having moved below for a directed verdict, a challenge of the verdict for insuffi-

ciency of the evidence is not open to him here. For the same reason, that the complaint he now makes of the charge was not made below, he cannot make it here.

"But these barriers in the way of relief from the judgment on these grounds aside, appellant can take nothing by his appeal, for the evidence was sufficient to support the verdict, and no prejudicial error in the charge is made to appear.

"The judgment is AFFIRMED."

JURISDICTIONAL STATEMENT

Jurisdiction is involved under Sec. 1254, Title 28, U. S. C. A. The opinion of the Court of Appeals, 5th Circuit, was filed on June 12, 1952. Petition for Rehearing was by the Court of Appeals, denied on July 14, 1952, without opinion.

STATEMENT OF THE CASE

Appellant, a person who had never used narcotics (R. 54), a veteran of the last war (R. 60), whose trade is that of painter and contractor (R. 56, 57), was arrested in his own home at 3411 Douglas Street, Dallas, Texas, and his house searched, about 2 o'clock, A.M., July 22, 1951 (R. 14, 16). Appellant was asleep in bed (R. 14-53) and was awakened by some one punching him in the ribs with a pistol (R. 53). A small bottle of 51 tablets, containing ⅓ grain of Pantopen (17 grains in all) and a small quantity of dolophine (R. 51) and claimed by the police officers to have been found in a window of the room where appellant was sleeping, near appellant's cigarettes and lighter (R. 16), and being that type of drug obtainable upon prescription of a doctor (R. 52), was not appellant's property (R.

52), the bottle never having been seen by appellant until he was taken to police headquarters (R. 49), he did not know it was in the house and had never seen it before (R. 53, 54), and so advised the arresting officers (R. 55), who tried to get him to make a statement that it was his (R. 55). The room in which the bottle was found, was the residence of two girls, Frances Morgan and Peggy White (R. 22, 53, 55, 44). Said girls reputed to be prostitutes (R. 60).

Entry into appellant's house was made by Police Officers Ganaway, Totten and Bentley through the back door which was found unlocked (R. 14, 15, 16) approximately 2 o'clock, A.M., and Lt. Ganaway having attended the F. B. I. School at Quantico, Va. (R. 27), and being familiar with Federal practice permitting State Officers to testify in Federal Court to matters secured with an illegal search (R. 27), yet he allegedly executed a Search Warrant (R. 14), allegedly obtained by Detective Totten (R. 22, 28) on the 20th day of July, 1951, two days before the arrest and search (R. 29, 30), whereas the information justifying the Warrant was obtained only two or three hours before the raid at 2 o'clock A.M., July 22, 1951 (R. 22), such information being received almost two days after the Search Warrant was issued, allegedly upon such information (R. 22, 29, 30). This discrepancy was cited to support the charge that the search was first made and the warrant procured later (R. 28, 41, 43, 44) from Justice of the Peace Richburg in Oak Cliff rather than in Dallas near the police and the place searched (R. 14, 29, 43).

In the raid a small quantity of narcotics was found to-wit: pantopen and dolophine of the type that is procurable upon prescription (R. 51, 52) and also a bottle of liquid dolophine which bore the name of the doctor prescribing, the name of the patient, Tommie Van Buren and the drug store where it was filled (R. 24, 25).

SPECIFICATIONS OF ERROR

1. The Court of Appeals, 5th Circuit, erred in affirming the judgment of the trial court because it failed to instruct the jury on the law of the case.

2. The Court of Appeals, 5th Circuit, erred in failing to hold that venue was not proven for the reason that the presumption arising from possession of narcotics does not reach to venue where the charge is unlawful purchase.

3. The Court of Appeals, 5th Circuit, erred in affirming the judgment of the trial court because the trial court admitted over petitioner's objection, hearsay testimony which was highly prejudicial.

ARGUMENT

1. The trial judge failed to instruct the jury on the law of the case. His charge was oral (Tr. 313 to 317) and nowhere was the jury instructed as to the law applicable to the case they were trying. They were not instructed as to the ingredients of the offense nor what proof was necessary to sustain the charge.

Judges must explain the law to the jury. They must separate the rule of law from the question of fact. This

produces both precision in the statement of the rules, and a clear outside judgment on the facts. This was not done. The marihuana taxing act was not read to the jury, neither was it defined to them. No explanation of the law was given the jurors. They were left to conjecture as to what constituted the offense charged. The judge, at no time, stated any proposition of law. He only stated the law's application. As pointed out by this Court in *Screws v. United States, 325 U. S. 91*, such a charge is erroneous.

In *Morris v. United States, 156 Fed. 2d 525*, the Ninth Circuit, Judge Stephens said:

> "Thus, at an early stage in legal history we find the judge duty bound in his position to give instructions on the law to the jury. He was privileged to suggest or give examples as to law. The law might be applied, but this after or in conjunction with the offense had been defined to the jury: It remained the duty and privilege of the jury to apply the law."

In the instant case the trial court did not define the offense nor did he give the jury any instructions as to the law. How could the jury know what law they are applying the facts to? Then Judge Stephens continues:

> "The charge to the jury should not leave the jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged. The jury must not be reduced to the position of a mere ministerial agent by a direction on their very thought, thereby withholding a vital right due them. And the judge may not pass judgment on the ability of a jury to correctly act in any given situation and in his discretion limit their historic province. The jury is in no sense the agent of the judge. They both derive their

> origin from the same high source, and the judge in laying down rules to guide the jury in their deliberations, merely acts as the mouth piece of the law for the purpose of making out a definite and clearly ascertained path by which the ends of justice are attained."

It is self-evident that the jury must have the law given to it in order that it can perform its function.

In *Campbell v. United States, 167 Fed. 2d 451*, the Fifth Circuit, through the late Judge Lee reversed a conviction on the grounds urged here and in doing so said: That the trial court, who merely read the statute to the jury without explaining it or stating what proof was necessary under it, failed to discharge his duty in instructing the jury. In Petitioner's case the judge did not even read the statute to the jury nor did he explain any statute to them.

Petitioner says that the failure of the trial court to instruct the jury on the law of the case cost him a fair and impartial trial. That the error is fundamental in nature and should be noticed by the reviewing court. Otherwise, American Jurisprudence, in the National Court, has broken down, and that type of fair trial guaranteed to all has been denied. Why have a jury trial if the jury is not to be advised on propositions of law?

2. The evidence in this case reflects that a small quantity of a narcotic drug was found in a bottle in a window of a room in which appellant was sleeping. The record is uncontradicted that the room in which appellant was sleeping was the home of two girls, allegedly prostitutes. The record further reveals that appellant is not a user of narcotics and

he testified that he has never seen the contraband before and did not know it was there. The evidence does not place the defendant in possession of such drug, it not being on his person and others having access to the room and premises where it was found. The record further shows that the drug is obtainable upon the prescription of a doctor, and that one Tommie Van Buren had obtained such like prescription, and that such prescription was found in the bathroom of appellant's house by the same officers. The government's case is predicated and was submitted to the jury, upon the theory, that appellant's possession of the drug was presumptive evidence that he had unlawfully purchased same, not in nor from the original stamped package, within the jurisdiction of this court. Appellant says that the government did not prove appellant's possession of the drug in the first place, and secondly, that if it had so proved possession that such proof alone would not have been sufficient to make out a case against appellant of unlawfully purchasing same, not in nor from the original stamped package.

In *Donaldson v. U. S., 23 F. 2d 178* (8th Circuit), the court made the following observations on the point raised here, to-wit:

> "The third count charged him with purchasing morphine, the same not being in the original stamped package, or from the original stamped package, and he not having then and there obtained said drug from a registered dealer or physician on a prescription. There was no direct evidence of a purchase by defendant. The prosecution relied on the statutory presumption attached to the section, to sustain the charge of

purchase of the unstamped package. There was no evidence tending to show that the alleged purchase was made within the court's jurisdiction, or where it was made or when. We held in Brightman v. U. S., 7 F. 2d 532, on this identical proposition, that the statutory presumption did not include the subject of venue, that there must be some proof that the crime charged was committed within the jurisdiction of the Court, and without that proof the Court could not assume it had jurisdiction over the subject matter and the right to punish defendant and restrain him of his liberty. Certainly, the defendant was not required to furnish this proof or to show that he had committed the offense charged elsewhere. 'Crimes are in their nature local and the jurisdiction of crimes is local.'

"It was necessary to lay the venue in the indictment that was done; and to prove it by direct or circumstantial evidence, that was not done. Hence, there was no proof from which it can be said the Court had jurisdiction of the crime charged and power to punish the defendant therefor."

Eliminate from the record the alleged possession of the contraband, as evidence of his purchase of same, the record would be completely bare of evidence of purchase. And even if it was evidence of a purchase, it is not evidence of the Venue of the purchase. *(DeBellis v. United States, 22 F. 2d 948; DeMoss v. United States, 14 F. 2d 1021.)*

3. An examination of the entire record discloses that the search and seizure was made at 2 A.M. on an alleged Search Warrant showing it to have been issued on two different dates; and that said Search Warrant not authorizing a search at night; the information upon which said Search Warrant was based not having been obtained until two days after the alleged issuance of said alleged Search

Warrant, it then becomes clear why the prosecutors were so anxious and the witness Ganaway so willing and eager to testify to the prejudicial matters hereinabove set forth.

In *Wharton's Criminal Evidence, Vol. 3, Section 1284,* it is said:

> "Generally, a witness should be confined in his testimony to statements of fact, his opinion being irrevelant and inadmissible."

And then in *Underhill's Criminal Evidence, Section 234, page 439,* it is said:

> "A mere guess, conjecture or presumption of a witness is objectionable."

In *Brown v. U. S., 298 Fed. 428,* the court had this to say in condemning the trial court for permitting a witness to testify as to his opinion and conclusion:

> "As a general rule witnesses are not allowed to testify to their opinion or conclusion on material matters, but must state facts within their knowledge relevant to the issue as it is the province of the jury to draw deductions and conclusions from pertinent facts placed in evidence and to decide matters directly in issue."

Appellant insists that the foregoing matters and things deprived him of a fair and impartial trial and requires a reversal of this case.

CONCLUSION

Petitioner urges that the Court of Appeals, in its opinion, erred in failing to hold that petitioner was deprived of a fair and impartial trial because the trial judge failed to

instruct the jury on the law applicable to the case. That in addition thereto the Court of Appeals erred, in its opinion, in failing to hold that proof of possession of narcotics did not create the presumption that such narcotics was purchased within the jurisdiction of the court. One presumption cannot be placed upon another, yet, the presumption of guilt arising from possession was permitted to be placed upon the presumption that petitioner was in possession of said narcotics, thereby violating said rule. In addition thereto the Court of Appeals, in its opinion, erred in failing to hold that the trial court committed error because of the admission of prejudicial evidence which violates the hearsay rule.

For all of the grounds and reasons heretofore stated, petitioner says that his petition for Writ of Certiorari to the Court of Appeals, 5th Circuit, to review the judgment of said court in affirming the judgment against petitioner entered in the United States District Court for the Northern District of Texas, Dallas Division, is well supported in law and in fact, and ought to be allowed and granted, and the case reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 255

HOLMES MARCY DAVENPORT, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 71-73) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 12, 1952 (R. 73). A petition for rehearing was denied July 14, 1952 (R. 79). The petition for a writ of certiorari was filed August 5,

1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the charge to the jury, to which no objection was made at the trial, was adequate.

2. Whether proof of possession of narcotics was sufficient to prove venue.

3. Whether it was proper to permit an experienced police officer to explain that a device found in the search of defendants premises was customarily used by handlers of narcotics.

STATUTE INVOLVED

26 U.S.C. 2553(a) (53 Stat. 271, as amended, 58 Stat. 721) provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and

3220 shall be prima facie evidence of liability to such special tax.

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of Texas of violating 26 U.S.C. 2553(a) by the unlawful purchase of a narcotic drug, pantopon, not in the original stamped package and without appropriate stamps affixed thereto (R. 6-7). He was sentenced to imprisonment for two years (R. 7). On appeal, the judgment was affirmed (R. 73).

Before trial, petitioner moved for a continuance on the ground that his principal attorney, Mr. Wade, was ill (R. 4-5). The United States Attorney opposed the motion, stating that Wade's associate, who was in court, had represented petitioner from the inception of the case, that strenuous efforts had theretofore been made to get the case postponed and that additional trial counsel, who was present in court prepared to assist in the defense if the motion were overruled, was known to be very competent (R. 8-9). The court overruled the motion (R. 10).

The evidence for the Government was to the effect that on July 22, 1951, at about two o'clock in the morning, state police officials, armed with a state search warrant, entered premises in which petitioner resided, and, after awakening petitioner, handed him the warrant (R. 13-16, 20-21, 35-37, 39-40). On the windowsill near petition-

er's bed were cigarettes, a cigarette lighter, and a small bottle (R. 16, 18, 19-20, 40), the contents of which, upon analysis, were found to include 51 tablets of a derivate of opium known as pantopon hydrochloride (R. 51). The officers also found other narcotics and a finger-stall, a device commonly used by handlers of narcotics (R. 31-34).

The state officers testified that they were not working with federal agents (R. 14-15, 26, 47), but that they did intend, if narcotics were found, to submit the case to federal authorities for adoption (R. 26, 45).

Defendant testified that the pantopon was not his (R. 53-54) and that the room in which he was found was that of a girl to whom he had rented it (R. 53).

In submitting the case to the jury, the judge read the indictment (R. 61) and again repeated its substance in telling the jury what it must find (R. 62-63). He summarized the evidence and gave an instruction on the factors to be considered in judging circumstantial evidence (R. 63-64). He specifically charged that if, from any ruling of any portion of the charge, the jury received the impression that the court had an opinion, they were to disregard that impression since they were the sole judges of the facts (R. 64-65).

Defense counsel entered an objection to a statement that cigarettes were found on the window-sill, but when the judge pointed out that he had said such was the testimony of the government,

counsel said he had no further objection (R. 65-66).

ARGUMENT

1. Petitioner's contention that the trial judge failed properly to instruct the jury on the law (Pet. 3, 4, 11-13) is obviously without merit. The charge of the indictment was a simple one and was twice given to the jury, once in *haec verba,* and once in summary statement. The only real issue was whether the drug was in petitioner's possession, an inescapable inference if the testimony of the officers was credited, or whether, as petitioner claimed, he knew nothing about the drug. That issue the judge left to the jury after summarizing the testimony and instructing them as to the factors to be considered in evaluating it. Significantly, experienced trial counsel entered no objection to the charge. Petitioner is therefore clearly precluded under Rule 30, F.R. Crim. P., from raising for the first time on appeal, the general objection he now makes.

2. In support of his argument that there was no evidence of venue (Pet. 3, 4, 13-15), petitioner cites cases disapproved and in effect overruled by this Court in *Casey* v. *United States,* 276 U.S. 413, 417-418. It has long been settled that possession of the proscribed drugs constitutes *prima facie* evidence, not only of illegal purchase, but of venue. *Casey* v. *United States, supra; United*

States v. *Pisano*, 193 F. 2d 355, 360 (C.A. 7); *United States* v. *Chiarelli*, 192 F. 2d 528, 532 (C.A. 7), certiorari denied, 342 U.S. 913; *Frazier* v. *United States*, 163 F. 2d 817, 818 (C.A. D.C.), affirmed, 335 U.S. 497.

3. The testimony of the police officer explaining the nature of a finger-stall, such as that found in the course of the search of petitioner's residence,[1] (R. 31-34) clearly was not, as petitioner contends (Pet. 3, 5, 15-16), improper hearsay testimony. The defense on cross-examination first brought out the fact that the officers found narcotics in addition to the tablets involved in the charge for which petitioner was tried (R. 24). On re-direct, the officer was asked to specify the nature of such other narcotics. He mentioned that some were found in a finger-stall and explained what that was (R. 31-34). The officer, with fifteen years' experience in police detective work, was obviously qualified to explain why he knew the device to be a finger-stall and for what purpose it was generally used. Cf. *Shew* v. *United States*, 155 F. 2d 628 (C.A. 4), certiorari denied, 328 U.S. 870.

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[1] While petitioner does not attack the validity of the search, he insinuates that there was impropriety in obtaining the warrant (Pet. 15-16). As the court below points out (R. 72), the insinuations find no support in the record. The officers testified that they obtained the warrant before they made any search (R. 29-30, 44) and that they waited two days to make the search to be certain the narcotics would be there (R. 43).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
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CHARLES B. MURRAY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

SEPTEMBER 1952.

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